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FILED
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Clerk, U.S. District Court
Central District of California
Los Angeles

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	No.CV 98-8264-WJR(Mc)
Petitioner,	PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY; POINTS AND AUTHORITIES; [PROPOSED] ORDER.
v.	
WILLIAM DUNCAN, Warden, California Men's Colony	
Respondent.	

Petitioner Yahya Lavi, pursuant to 28 USC 2253(c)(2) and FRAP 22(b), requests the Court to issue a Certificate of Appealability granting leave to appeal from the final order entered on April 8, 1999, which adopts the

Report and Recommendation of the United States Magistrate Judge dismissing with prejudice the Petition for Writ of Habeas Corpus filed herein for failure to comply with the one-year statute of limitations of 28 U.S.C. 2244(d).

The grounds for this request are set out with particularity in the Points and Authorities which follow. A Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit has been filed simultaneously herewith.

PROCEDURAL HISTORY

Petitioner is confined at the California Men's Colony at San Luis Obispo under a sentence of thirteen years following his conviction of two counts of rape of an unconscious victim, three counts of rape by a foreign object of a victim unable to resist, two counts of sexual battery of an institutionalized person, and three counts of misdemeanor sexual battery.

On July 22, 1997, petitioner filed a Petition for Writ of Habeas Corpus in this Court, CV 97-5368-WJR (Mc), which raised three fully exhausted constitutional claims:

1) Violation of the Sixth Amendment right of confrontation and the Fourteenth Amendment right to due process of law through restriction of cross-examination at trial.

2) Violation of the Fourteenth Amendment right to due process of law by the admission of inflammatory and irrelevant trial evidence concerning petitioner's character and prior bad acts which rendered the

proceeding fundamentally unfair.

3) Cumulative prejudice from Claims 1 and 2 which rendered the proceeding fundamentally unfair, denying due process.

On September 18, 1997, petitioner amended the petition to add an additional claim for ineffective assistance of counsel which was exhausted in the California Supreme Court on September 8, 1997. The amended petition also expanded the previous claim of cumulative error to include ineffective assistance of counsel.

Upon motion of Respondent, the amended petition filed September 18, 1997, was dismissed without prejudice by Order entered March 6, 1998, due to the failure to exhaust state remedies with regard to the claim of cumulative prejudice, as it related to the ineffective assistance of counsel claim. The Court reasoned that while each of the claims of trial court error and the claim of ineffective assistance were separately exhausted, the cumulative prejudice therefrom had not been specifically raised in the state court. In so doing, the Court rejected petitioner's argument that it would be futile to return to state court to argue cumulative prejudice from errors when the California courts had already determined that no errors had occurred.

Petitioner then returned to state court and exhausted the cumulative error claim, and petitioner filed the instant petition on October 9, 1998, which again raised the four constitutional claims which had been dismissed on March 6, 1998. Upon motion of Respondent, this Court dismissed the petition by Order entered April 8, 1999, on the ground that the second petition was not filed within the one-year

statute of limitation set out in 28 USC 2244(d). Petitioner seeks to appeal this final order.

MEMORANDUM OF POINTS AND AUTHORITIES

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) changed appellate procedure for habeas corpus cases by replacing Certificates of Probable Cause with Certificates of Appealability (COA).

> 28 U.S.C. 2253 now states, in pertinent part:
> (c)(1) Unless a circuit judge or district judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from---
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rule of Appellate Procedure 22 states:

(b) Certificate of Appealability.

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. 2255 proceeding, the applicant cannot take an appeal unless a circuit judge or district judge issues a certificate of appealability under 28 U.S.C. 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue an certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district court judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

While 28 U.S.C. 2253(c) speaks only of COAs for constitutional issues, a COA is also required when the petition has been dismissed on procedural grounds. See, Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997) [appeal from dismissal for failure to exhaust state remedies]. A two-step COA process is utilized when the dismissal is on procedural, nonconstitutional grounds. Robinson v. Johnson, 151 F.3d 256, 263 (5th Cir. 1998).

This two-step process applies to dismissal under the AEDPA statute of limitation. Sonnier v. Johnson, 161 F.3d 941, 943 (5th Cir. 1998); Davis v. Johnson, 158 F.3d 806, 809 (5th Cir. 1998). First, the court determines whether the petitioner "has made a credible showing that his claim

should not have been dismissed as time-barred." Davis, 158 F.3d at 809. If that showing is made, the court then determines "whether the prisoner has made a substantial showing of the denial of a constitutional right on the underlying claims." Sonnier, 161 F.3d at 944.

Any doubt about entitlement to a COA should be resolved in favor of granting it. See, Sonnier, 161 F.3d at 944; Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir.), *cert. denied*, 118 S.Ct. 399 (1997).

I

PETITIONER CAN MAKE A CREDIBLE SHOWING THAT HIS PETITION IS NOT TIME-BARRED.

Petitioner is in a unique circumstance. He timely[1] filed four constitutional claims. At the insistence of Respondent he was forced to return to state court to exhaust one claim only -- the claim of cumulative prejudice as it related to the ineffective assistance of counsel claim. He reasonably believed that his right to return to this Court was secure because the dismissal was "without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies with regard to the issues raised therein." Respondent raised no objection to this language. Now, at Respondent's insistence, Petitioner's return to federal court has been deemed time-barred.

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[1]The first petition was filed on July 22, 1997 and amended September 18, 1997. This Court has determined that the one-year statute of limitation ran on December 4, 1997.

All of this arises from the debatable determination by this Court that the first petition contained an unexhausted claim, *viz.*, that of cumulative prejudice premised on the ineffective assistance of counsel claim. Petitioner continues to maintain that the Court was plainly wrong because each of Petitioner's substantive claims had been presented to the California courts which found no error. Therefore there was no error to "cumulate."

Cumulative prejudice arises from the quantitative effect of multiple harmless errors which render a trial fundamentally unfair. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Lundy v. Campbell, 888 F.2d 467, 472-73 (6th Cir. 1989), cert. denied, 110 S.Ct. 2212 (1990). But in Petitioner's case the California courts did not find harmless error. The state courts found no error. A petitioner is not required to exhaust that which has already been determined or make a clearly futile return to the state court. See 28 U.S.C. 2254 (b)(1)(B); Rupe v. Wood, 93 F.2d 1434, 1440 (9th Cir. 1996).

This issue alone should justify a Certificate of Appealability. Respondent may argue that the dismissal for lack of exhaustion should have been appealed at that time. But this is the first reasonable opportunity to bring the issue to the appellate court. Respondent raised the exhaustion issue in November 1997. The statute of limitations ran on December 4, 1997, because, as this Court has ruled, the federal habeas pendency did not toll the one-year statute. If this Court had promptly ruled, petitioner could have returned to state court prior to December 4, 1997. If petitioner had appealed the exhaustion ruling to the Ninth Circuit, and the ruling was affirmed, petitioner would then have been time-barred from refiling because the federal filing did not toll the statute of limitations. If petitioner had

attempted to simultaneously exhaust the cumulative prejudice claim in the state court while appealing to the Ninth Circuit, the pendency of the state action would have mooted the federal appeal. In short, petitioner had no reasonable opportunity prior to now to appeal.

Petitioner took the reasonable course and relied on this Court's dismissal without prejudice as granting him the right to return. At that time (March 6, 1998), he did not know that Respondent would later contend that the statute of limitation had run on December 4, 1997. Respondent silently acquiesced in the March 6, 1998, dismissal "without prejudice to petitioner's right to file a new petition after he has exhausted state remedies."

The one-year AEDPA statute of limitations is not a jurisdictional bar and is subject to equitable tolling and estoppel. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 899 and 1389 (1998); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998). Such an estoppel can be found when the state silently acquiesces in the court's ruling permitting return after exhaustion. Burris v. Parke, 95 F.3d 465 (7th Cir. *en banc* 1996). That is the precise circumstance here.

As petitioner can make a credible showing that his petition is not time-barred, a Certificate of Appealability should issue.

II

PETITIONER CAN MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AS TO EACH OF HIS

FOUR CLAIMS.

Claim One:

Petitioner claims that the trial court improperly restricted cross-examination of the alleged sexual assault victims in violation of the Sixth and Fourteenth Amendments. Four of Petitioner's five accusers were each civilly suing him for $5 million in damages. The trial court refused to permit cross-examination as to the amount of money these women were seeking. Petitioner was also not permitted to cross-examine witness Lazara G. regarding a prior false claim of sexual harassment and police report filed by her. The Sixth and Fourteenth Amendments require full exploration on cross-examination of issues of credibility and bias. See, United States v. Abel, 105 S.Ct. 465 (1984); Davis v. Alaska, 94 S.Ct. 1105 (1974).

Claim Two:

Petitioner claims denial of due process of law by the introduction of inflammatory and irrelevant evidence of bad character and prior bad acts which rendered the trial fundamentally unfair. Specifically, the prosecution was allowed to bring out Petitioner's gross income ($460,000 in 1989); that he had referred to his accusers as "dirty and smelly;" and that he had practiced medicine without a license, misrepresented his training, and dispensed controlled substances without a license. Due process requires adherence to rules of evidence consistent with proof beyond a reasonable doubt and relevance. See, Brinegar v. United States, 69 S.Ct. 1302, 1310 (1949); McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 622 (1993).

Claim Three:

Petitioner claims ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments. Counsel was in possession of an investigative interview with Hector Rosales, former job supervisor of victim Lazara G. This report detailed that Lazara G. had made false claims of sexual harassment against Rosales. Counsel failed to call Rosales as a witness. This omission in the context of all the surrounding circumstances was outside the range of professional competence and, but for such incompetence, there is a reasonable probability that the result would have been different. See, Strickland v. Washington, 104 S.Ct. 2052 (1984).

Claim Four:

Petitioner claims that the cumulative prejudice from the above constitutional errors rendered the trial fundamentally unfair and denied him due process of law. See Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).

CONCLUSION

For the foregoing reasons, a Certificate of Appealability should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD H. KIRSCHNER,
A Professional Corporation

By s/ Richard H. Kirschner
Richard H. Kirschner

Attorney for Petitioner,
YAHYA LAVI.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10850 Wilshire Boulevard, Los Angeles, CA.

On April 28, 1999, I served the foregoing document described as PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY; POINTS AND AUTHORITIES; [PROPOSED] ORDER on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

OFFICE OF THE ATTORNEY GENERAL
300 S. Spring Street
Los Angeles, CA. 90013

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 28, 1999, at Los Angeles, California.

s/ Judith Pierce
JUDITH PIERCE